Filed 4/9/09 P. v. Tucker CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. THOMAS WILLIAM TUCKER, Defendant and Appellant.	E045687 (Super.Ct.Nos. SWF016315 & SWF019480) **OPINION**

APPEAL from the Superior Court of Riverside County. Robert George Spitzer and Michael S. Hider,* Judges. Affirmed with directions.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Lilia E. Garcia, Arlene A. Sevidal, and Alana Butler, Deputy Attorneys General, for Plaintiff and Respondent.

* Retired judge of the Merced Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Jane Doe #1 (Doe 1) and Jane Doe #2 (Doe 2) moved into defendant's house in Perris during their senior year in high school when they were both 17 years old. Defendant engaged in a sexual relationship with Doe 1, who was his niece, throughout her senior year and after she turned 18 years old. Defendant also had sexual intercourse and engaged in oral copulation with Doe 2 during the same time.

Defendant was convicted of eight counts of unlawful sexual intercourse, six counts of penetration by a foreign object, two counts of sodomy, and two counts of oral copulation with minors under the age of 18. Defendant now contends:

1. Although he was convicted of six counts of penetration by a foreign object and two counts of sodomy for acts committed against Doe 1, the evidence presented only supported four counts of penetration by a foreign object and one count of sodomy.

2. The Penal Code section 1203.1b[1] fee (probation report fee) and the section 1202.5 fee (fee for violations of certain theft offenses) must be stricken as they are inapplicable to defendant.

The People concede, and we agree, that the fee imposed pursuant to section 1202.5 must be stricken. We will otherwise affirm the judgment in its entirety.

I

PROCEDURAL BACKGROUND

Defendant was found guilty of committing the following acts against Doe 1 while she was under the age of 18: six counts of unlawful sexual intercourse (§ 261.5, subd.

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[1] All future statutory references are to the Penal Code unless otherwise indicated.

(c)), six counts of penetration by a foreign object (§ 289, subd. (h)), two counts of sodomy (§ 286, subd. (b)(1)), and one count of oral copulation (§ 288a, subd. (b)(1)). In addition, he was found guilty of committing two counts of unlawful sexual intercourse with a minor (§ 261.5, subd. (c)) and one count of oral copulation (§ 288a, subd. (b)(1)) against Doe 2 when she was under the age of 18.[2] Defendant was sentenced to 10 years in state prison.

II

FACTUAL BACKGROUND[3]

A. *Prosecution*

1. *Doe 1*

At the time of trial, Doe 1 was 21 years old. She was born in June 1986. In early 2000, Doe 1 lived in Sonora, California with her mother, who was defendant's sister.

In February 2002, when she was 16 years old, Doe 1 visited defendant at his home in Perris. They went to a dirt bike race. When they returned to defendant's home after the race, he gave her some alcohol. Doe 1 drank so much that she got sick. Defendant

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[2] The convicted charges constituted counts 1 through 18. Prior to the case being submitted to the jury, the trial court entered a judgment of acquittal pursuant to section 1118.1 on counts 19 and 23, which were charges of possession of child pornography (§ 311.2, subd. (b)) and exhibition of pornography to a minor (§ 288.2, subd. (a)). The jury found defendant not guilty of a violation of section 288, subdivision (c) against John Doe #5 (count 21). The jury could not reach verdicts on charges of committing lewd conduct with a minor (§ 288, subd. (a)) involving Jane Does #3 and #4 and those counts (20 & 22) were dismissed.

[3] Since defendant was acquitted of the charges involving John Doe #5, and the charges involving Jane Does #3 and #4 were dismissed (see fn. 2, *ante*), we will not include the facts pertaining to those counts in the statement of facts.

helped her get undressed for bed. The next morning, defendant asked Doe 1 if she remembered what had happened the night before. When she told him that she did not, he told her he had sucked on her breast when he took her shirt off.

After that time, defendant would be in Sonora once a month for business. On one visit, Doe 1 orally copulated him in her room. A "couple times," they drove to a remote location in Sonora and had sex in his car.

Doe 1 moved in with defendant in Perris the summer of 2003, just prior to her senior year in high school and while she was 17 years old. Doe 1 moved to defendant's home because she was having trouble with her friends in Sonora. Her best friend, Doe 2, moved with her.

Doe 1 and defendant soon developed a sexual relationship. Although Doe 1 had her own room, she stayed in defendant's room, where they would have sex. Defendant knew that Doe 1 was only 17 years old.

Doe 1 lived in defendant's house her entire senior year of high school and after she graduated in 2004. Doe 1 and defendant had sexual intercourse her entire senior year, either in his home or at hotels. They used condoms on some occasions and other times did not. She got pregnant during this time, and defendant paid for an abortion. During Doe 1's senior year, they performed oral sex on each other.

During her senior year, defendant put a lava lamp in Doe 1's vagina. Defendant had also put his finger in her vagina at least five times. One time, he put his finger in her vagina while they were on a ride at Disneyland. Defendant had also placed a vibrator in her vagina either when she was in high school or after she graduated. During her senior

year in high school, defendant had put his penis in her anus "twice." Defendant and Doe 1 engaged in some type of sexual act every day or every other day while she lived with him.

Doe 1 moved out after she turned 18 years old in June 2004. After she moved out, Doe 1 and defendant continued to have sexual relations.

While Doe 1 was still in high school, defendant wrote a letter to her. In the letter, defendant states, in part: "Good morning my sweetness princess. Telling me I should have just raped you has really gotten my penis in a frenzy." He told her he may come into her room and "rape" her. He also stated that he wanted to take a bath with her. Defendant also stated: "Maybe it's me, but since I fucked [Doe 2] I feel like we're drifting apart." Defendant wanted to have "some nasty sex" with Doe 1. He suggested they rent a hotel room and run off and "fuck our brains out until we can't even walk." Defendant also wrote: "Oh, just so you know, you have one of the greatest feeling pussies I have ever felt. You asked who was better. You are at 10. [Doe 2] is maybe a three."

Doe 1 recalled two occasions during which she and defendant watched pornographic movies together. Defendant had taken a picture of Doe 1 (without showing her face) holding his penis.

Doe 1 could not estimate how many times she and defendant engaged in sexual relations before she turned 18 years old but thought it was "[a] lot." Doe 1 believed defendant was the father of the baby she had aborted because she did not start seeing another man until she was three months pregnant.

Defendant asked Doe 1 if he could have sex with Doe 2 while they were in high school, and she told him that he could. Doe 1 blamed herself for defendant having sex with Doe 2.

2. *Doe 2*

Doe 2 was 21 years old at the time of trial; she was born in September 1986. She moved in with defendant in July or August 2003. Doe 2 moved out of the house in August 2004. She was 16 and 17 years old when she lived with defendant.

After Does 1 and 2 had lived with defendant for a few months, Doe 2 started to have suspicions that there was some type of romantic relationship between defendant and Doe 1. On one occasion, she found Doe 1 sitting on the couch with defendant sitting on top of her facing her. They were under blankets but appeared to be wearing clothes.

In December 2003, Doe 1 went on a trip. Doe 2 and defendant were alone in the house. One night, defendant gave Doe 2 a massage and ended up touching her vagina. She could not recall if it was over or under her clothes. Doe 2 and defendant first had sex in February 2004. Doe 2 could not recall the details. They had sex between one and four other times. They also performed oral sex on each other.

Doe 1, Doe 2, and defendant watched pornographic movies together. Defendant and Doe 2 did not use birth control because he told her he was sterile.

Doe 2 wrote a letter to defendant. Part of the letter stated: "I knew what you meant when you said you liked to suck things. Why would that freak me out? Why would I think you are a freak? I would never think less of you no matter what you tell me or do." She also wrote that she was upset with him for telling Doe 1 his "secret."

3. *Investigation*

A search of defendant's residence revealed pornographic magazines, sexual aids, and pornographic movies. Items belonging to Doe 1 were also found in the house.

Detective Thomas Salisbury interviewed Doe 1 on March 17, 2006. Doe 1 told Detective Salisbury that in 2002 she viewed her relationship with defendant as that of a boyfriend and girlfriend. She told Detective Salisbury about the incident involving defendant taking off her shirt and sucking on her breast.

Doe 1 told Detective Salisbury that she and defendant had some sort of sexual contact every day while she lived with him; sometimes three or four times per day. Doe 1 told Detective Salisbury that defendant digitally penetrated her (by placing either his finger or "other objects" inside of her vagina) every day. Defendant took four or five photographs of Doe 1 that were of a sexual nature and put them on his computer.

Detective Salisbury interviewed Doe 2 on the same day. Doe 2 moved in with defendant because she was not getting along with her mom's boyfriend. Defendant came on to Doe 2 when Doe 1 went away to a leadership conference. Defendant touched her over her clothes on her breast and vagina. They eventually had sex. Doe 2 stated they had sex five to 10 times. She orally copulated him two or three times. Defendant knew she was 17 years old because she celebrated her birthday while living with him. Defendant was Doe 2's first sexual partner.

Defendant's ex-wife had seen pornographic movies and magazines in his house. Doe 1's mother told defendant's ex-wife that she found letters from defendant to Doe 1 and suspected they were having sex together.

B. *Defense*

Defendant testified on his own behalf. He admitted "some" of the unlawful sexual intercourse acts with Doe 1. He did not recall committing oral copulation with Does 1 and 2. He had sexual intercourse with Doe 2 on one occasion.

Defendant claimed he was intoxicated most of the times that he had sexual intercourse with Doe 1. He only had sex with Doe 2 on February 22, 2004, and then Doe 2 got a boyfriend. He admitted to having sex with Doe 1 prior to her turning 18 years old. He knew it was wrong. Defendant never required Does 1 and 2 to watch pornography.

Defendant said it was "possible" he and Doe 1 had had sexual intercourse six times between October 2003 and June 2004. Defendant claimed the digital penetration with his finger happened, but only after she was 18 years old. Defendant admitted he sodomized Doe 1 but that it happened after she moved out of his house. All the acts of oral copulation with Doe 1 were after she turned 18. Defendant was drunk the first time he and Doe 1 had intercourse, and she initiated it by coming into his bedroom. The night they went to the bike race, defendant was drunk and they kissed. He did not recall sucking her breasts. Defendant denied he ever put a lava lamp inside her vagina.

Defendant told Detective Salisbury in an interview prior to trial that he had a sex addiction. Defendant only had sexual intercourse with Does 1 and 2 while they lived with him. Defendant only had sexual intercourse with Doe 2 on one occasion. Defendant told Detective Salisbury that Doe 1 came on to him and wanted him to have sex with Doe 2. Defendant admitted he wrote the letter, mentioned *ante*, to Doe 1.

C. *Rebuttal*

Detective Salisbury was recalled. During a pretrial interview, defendant initially denied the allegations made by Does 1 and 2. At one point, defendant asked Detective Salisbury to turn off the tape recorder. Once the recorder was turned off, defendant asked Detective Salisbury about what would happen if he admitted that the girls were over 18 when the events occurred. Detective Salisbury told defendant that he had proof the girls were under 18 years old. Defendant then agreed that they were both under 18 when the sexual acts occurred.

III

INSUFFICIENT EVIDENCE OF SOME COUNTS OF PENETRATION BY A FOREIGN OBJECT (§ 289) AND SODOMY (§ 286) AGAINST DOE 1

Defendant contends that although the evidence supported he committed two counts of penetration by a foreign object (§ 289) and one count of sodomy (§ 286) against Doe 1, there was insufficient evidence presented to support the additional four counts of penetration by a foreign object and additional count of sodomy.

"In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) Rather, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the

defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

"[U]nless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Defendant does not argue that any elements of the crimes of violating sections 286 and 289 were not supported by the evidence, so we need not recite them here. Defendant's contention is based on his claim that Doe 1's testimony did not support the number of times the crimes occurred or that they occurred during her senior year, when she was 17 years old.

In *People v. Jones* (1990) 51 Cal.3d 294 (*Jones*), a case involving sexual molestation of several minors under the age of 14, the Supreme Court noted that "[c]hild molestation cases frequently involve difficult, even paradoxical, proof problems. A young victim[,] . . . assertedly molested over a substantial period by a parent or other adult residing in his home, may have no practical way of recollecting, reconstructing, distinguishing or identifying by 'specific incidents or dates' all or even any such incidents." (*Id.* at p. 305.) Accordingly, the Supreme Court concluded that "in determining the sufficiency of generic testimony, we must focus on factors other than the youth of the victim/witness. Does the victim's failure to specify precise date, time, place or circumstance render generic testimony insufficient? Clearly not. As many of the

cases make clear, the particular details surrounding a child molestation charge are not elements of the offense and are unnecessary to sustain a conviction. [Citations.] [¶] The victim, of course, must describe the kind of act or acts committed with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the number of acts committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping'). Finally, the victim must be able to describe the general time period in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us') to assure the acts were committed within the applicable limitation period." (*Id.* at pp. 315-316, italics omitted.)

Doe 1's testimony met the standard in *Jones*. As to the counts involving violations of section 289, penetration by a foreign object, Doe 1 testified as follows:

"[Prosecutor:] During—during the time that you lived with the defendant—again, let's talk about your senior year of high school—did you guys do anything sexually—any different things that we haven't talked about yet?

"[Doe 1:] Yes, of course.

"[Prosecutor:] What's one of those?

"[Doe 1:] I remember one time him sticking a lava lamp up inside of me.

"[Prosecutor:] Inside of you where?

"[Doe 1:] Inside of my vagina.

"[Prosecutor:] Did that happen during your senior year?

"[Doe 1:] Yes. And then I've been fingered before.

"[Prosecutor:] Okay. When you say that, again, I'm sorry, we have to—the law defines it in different ways. We have to be specific. When you say you've been fingered, does that mean that someone put their fingers inside of your vagina?

"[Doe 1:] Yes.

"[Prosecutor:] Did the defendant also do that?

"[Doe 1:] Yes.

"[Prosecutor:] Did he do that during your senior year of high school?

"[Doe 1:] Yes.

"[Prosecutor:] Do you remember how many times?

"[Doe 1:] I don't remember how many times. I remember one time we were at Disneyland, and we were on the ride and it happened. I don't remember how many times exactly, but I remember that specific day and that time it happened.

"[Prosecutor:] Did that happen—did he ever do that to you when you guys were living in the house in Perris?

"[Doe 1:] In Perris, yes.

"[Prosecutor:] Do you remember, was it more than five times, less than five times that he did that?

"[Doe 1:] Probably more than five times. I don't know."

In addition, Doe 1 told Detective Salisbury that while she was living with defendant, he digitally penetrated her with his finger every day.

Based on this testimony, the jury could reasonably conclude that defendant digitally penetrated Doe 1 at least seven times during her senior year. It was clear from the above exchange that the prosecutor was inquiring as to events that occurred during her senior year. In addition to the penetration with the lava lamp and the incident at Disneyland, Doe 1 explained with detail that defendant put his finger in her vagina. Although Doe 1 stated at trial that defendant committed these acts "[p]robably more than five times," since she also told Detective Salisbury that these events occurred every day, she likely felt the times that he committed these acts was even higher. Her testimony supported that these digital penetrations occurred at least five times. The jury could reasonably conclude that this occurred while she was still 17 years old based both on the context of the questioning by the prosecutor during trial and because she told Detective Salisbury that defendant placed his finger in her vagina every day that they lived together. Although defendant and Doe 1 lived together after she turned 18 years old, she did not specify that she was only talking about that time period. As stated in *People v. Matute* (2002) 103 Cal.App.4th 1437, 1446, "in child molestation cases, as long as the victim specifies the type of conduct involved, its frequency, and that the conduct occurred during the limitation period, nothing more is required to establish the substantiality of the victim's testimony."[4] Such standard was met here.

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[4] *Matute*, like the victim in this case, involved a victim who was 15 or 16 years old at the time of the molestations, unlike *Jones*, which involved children under the age of 14 years old. We agree with the court in *Matute* that the principles in *Jones* equally apply to older victims. (*People v. Matute*, *supra*, 103 Cal.App.4th at p. 1448.) As noted in *Jones*, "even a mature victim might understandably be hard pressed to

[footnote continued on next page]

Further, defendant did not present a defense as to how many times he penetrated Doe 1's vagina with his finger. Rather, he testified that he did not commit these acts until she was over 18 years old, and his counsel argued to the jury that if they believed Doe 1's testimony, then he was guilty of all of the penetration by a foreign object offenses. The jury could reasonably conclude that defendant committed these acts while Doe 1 was still 17 years old.

As for the two counts of sodomy, defendant faults Doe 1's testimony that defendant had sodomized her "I think twice." Under the standard set forth in *Jones,* Doe 1's testimony was sufficient to support that defendant sodomized her two times in her senior year. Again, defendant did not contest that this occurred on two occasions but, rather, that it was after she turned 18 years old. Doe 1's testimony was clear that these two acts of sodomy occurred during her senior year in high school.

We conclude the evidence supports defendant's convictions of six counts of violating section 289, and two counts of violating section 286.

IV

FINES IMPOSED PURSUANT TO SECTIONS 1203.1b AND 1202.5

Defendant contends the trial court erroneously imposed fines pursuant to sections 1203.1b, a presentence probation report preparation fee, and section 1202.5, a fee imposed for theft violations.

[footnote continued from previous page]
separate particular incidents of repetitive molestations by time, place or circumstance." (*Jones, supra,* 51 Cal.3d at p. 305.}

A. *Additional Factual Background*

The probation officer recommended that defendant pay the costs of the presentence probation report pursuant to section 1203.1b in an amount not to exceed $318. In addition, the probation officer recommended that a fee of $10 be assessed pursuant to section 1202.5. The trial court imposed the following sentence: "In addition, he'll pay the costs of the pre-sentence probation report pursuant to section [1203.1b] in an amount and manner to be determined by financial services, not to exceed $318." The trial court also ordered: "In addition, there will be a $10 fee under Penal Code section 1202.5 payable to the courts as directed by financial services."

B. *Analysis*

Section 1203.1b, subdivision (a) provides: "In any case in which a defendant is convicted of an offense and is the subject of any preplea or presentence investigation and report, whether or not probation supervision is ordered by the court, and in any case in which a defendant is granted probation or given a conditional sentence, the probation officer, or his or her authorized representative, taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision . . . . The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant's ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the

defendant's ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver."[5]

Defendant claims that the language of the statute is clear that it does not apply when a person is sentenced to state prison. This claim was rejected in *People v. Robinson, supra,* 104 Cal.App.4th at pages 904 and 905. We believe the court in *Robinson* properly rejected the claim raised by defendant in this case, and that analysis need not be repeated here. The section 1203.1b fine was properly imposed.

We find otherwise as to the section 1202.5 fine. Section 1202.5, subdivision (a) provides, in pertinent part: "In any case in which a defendant is convicted of any of the offenses enumerated in Section 211, 215, 459, 470, 484, 487, 488, or 594, the court shall order the defendant to pay a fine of ten dollars ($10) in addition to any other penalty or fine imposed." The fine is used to provide funds for local crime prevention. As conceded by the People, defendant was not convicted of the enumerated crimes in section 1202.5, and therefore the fine was not applicable to him and constituted an unauthorized sentence.

We note that neither the abstract of judgment nor the minute order of March 20, 2008, the date of sentencing, reflect any of the fines and fees imposed by the trial court in open court. These include the fines and fees discussed herein, a $110 booking fee

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[5] Defendant raises no claim on appeal that he was denied an appropriate hearing on the imposition of the fee. Since he never objected in the trial court on this basis, it would be waived. (*People v. Robinson* (2002) 104 Cal.App.4th 902, 904, fn. 2.)

pursuant to Government Code section 29550, and a $20 security fee pursuant to Penal Code section 1465.8, subdivision (a)(1). We will order the court to make the necessary corrections.

V

DISPOSITION

We order that the minute order of March 20, 2008, be modified to include the $318 fine imposed pursuant to Penal Code section 1203.1b, a $110 booking fee pursuant to Government Code section 29550, and a $20 security fee pursuant to Penal Code section 1465.8, subdivision (a)(1), and that the abstract of judgment be modified to add these fines and fees. The fine imposed pursuant to Penal Code section 1202.5 is to be stricken. A certified copy of the amended abstract of judgment shall be forwarded to the Department of Corrections and Rehabilitation. We otherwise affirm the judgment in its entirety.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

McKINSTER
J.